

Maine Water Quality Standards Litigation Briefing
August 27, 2018

Options for Next Steps in *Maine v. EPA*

Purposes of Briefing

- Obtain direction on procedural options for revising EPA's 2015 decisions that are being challenged in *Maine v. EPA*, to enable the Agency to provide the court with an estimate of the time that it will take the Agency to revise the 2015 decisions; **Ex. 5 DPP / ACP / AWP**

Ex. 5 DPP / ACP / AWP

- Describe and discuss potential substantive options if the Agency were to obtain a voluntary remand without vacatur.

Status of Litigation

- On July 27, EPA moved the court for a voluntary remand without vacatur of the 2015 decisions back to the Agency. These decisions included:
 - EPA's approval of a sustenance fishing designated use (SFDU), both as an interpretation of Maine's fishing DU and approving provisions of the Maine Implementing Act (MIA) as a DU; and
 - EPA's disapprovals of Maine's human health criteria (HHC).
- On August 1, the Penobscot Nation moved to amend its complaint to include a count under the Declaratory Judgment Act to secure a ruling from the court that the MIA provides for sustenance fishing in the Tribe's waters and Maine is obligated to separately protect sustenance fishing in its WQS.
 - **Ex. 5 DPP / ACP / AWP**
 - EPA will file a response (due 9/14) indicating that the Agency takes no position at this time on the Penobscot Nation's motion.
- On August 2, the court ordered the following briefing schedule on EPA's motion to remand:
 - 9/14 – Maine's response due;
 - 9/28 – Tribes' response due; and
 - 10/12 – EPA's reply due (and possible Maine reply to Tribes' response).

Process on Remand

Decisions on Remand

- 1) Withdrawal of EPA's prior approvals of the SFDU in Tribal waters, and subsequent action on (approval of) Maine's general "fishing" designated use – Ex. 5 DPP / ACP / AWP

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- 2) Withdrawal of EPA's 2015 disapprovals of Maine's HHC, and subsequent decisions approving and/or disapproving Maine's HHC – Ex. 5 DPP / ACP / AWP

Ex. 5 DPP / ACP / AWP

- 3) Withdrawal or revision of EPA's federal HHC promulgated in response to the 2015 disapprovals Ex. 5 DPP / ACP / AWP

Ex. 5 DPP / ACP / AWP

Procedural Options on Remand:

Option 1:

Ex. 5 DPP / ACP / AWP

Ex. 5 DPP / ACP / AWP

• **Considerations:**

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Ex. 5 DPP / ACP / AWP

Option 2:

Ex. 5 DPP / ACP / AWP

Ex. 5 DPP / ACP / AWP

- Considerations:

Ex. 5 DPP / ACP / AWP

Option 3:

Ex. 5 DPP / ACP / AWP

Ex. 5 DPP / ACP / AWP

- Considerations:

Ex. 5 DPP / ACP / AWP

Ex. 5 DPP / ACP / AWP

Options for Revising the 2015 Decisions After Remand

Ex. 5 DPP / ACP / AWP

A. Designated Use Decisions

Ex. 5 DPP / ACP / AWP

- Rationale:

Ex. 5 DPP / ACP / AWP

- Considerations:

Ex. 5 DPP / ACP / AWP

B. HHC Decisions

Ex. 5 DPP / ACP / AWP

Option 1:

Ex. 5 DPP / ACP / AWP

Ex. 5 DPP / ACP / AWP

- Rationale:

Ex. 5 DPP / ACP / AWP

- Considerations:

Ex. 5 DPP / ACP / AWP

Ex. 5 DPP / ACP / AWP

Option 2:

Ex. 5 DPP / ACP / AWP

Ex. 5 DPP / ACP / AWP

- Rationale:

Ex. 5 DPP / ACP / AWP

¹ This is true for all carcinogens except arsenic, where Maine's criteria are based on a FCR of 138 g/d and a CRL of 10^{-4} .

Ex. 5 DPP / ACP / AWP

- Considerations:

Ex. 5 DPP / ACP / AWP

Option 3:

Ex. 5 DPP / ACP / AWP

Ex. 5 DPP / ACP / AWP

- Rationale:

Ex. 5 DPP / ACP / AWP

- Considerations:

Ex. 5 DPP / ACP / AWP